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NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1984

VICTOR DANTE and EDWARD LEVINE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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1988

QUESTION PRESENTED FOR REVIEW

OREGON v. KENNEDY, 456 U.S. 667 (1982) BARS REPROSECUTION WHERE A PROSECUTOR INTENDED TO CAUSE A MISTRIAL. WHAT STANDARD OF REVIEW GOVERNS APPELLATE REVIEW OF A TRIAL COURT FINDING THAT THERE WAS NO INTENTION TO CAUSE A MISTRIAL?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not yet reported. It is reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1984. No rehearing was sought. This petition has been filed within 60 days of that date pursuant to Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

STATEMENT OF THE CASE

The Court of Appeals affirmed the District Court's denial of Petitioner's double jeopardy motion to dismiss. The District Court had found that the mistrial caused by the prosecutor was not intentional, and therefore not violative of *Oregon v. Kennedy*, 456 U.S. 667 (1982).

The misconduct which triggered the mistrial was the prosecutor's prompt violation of the trial court's explicit admonition against mentioning "organized crime" to the jury. After the prosecutor had violated the Court's order, and admitted his misconduct, the trial judge stated:

> That's kind of a startling admission. I have been here for four years but I never had a

> representative of the government make a unilateral determination [to breach an agreement] before, or for that matter, any party. (T 107).

The mistrial was granted. Six weeks later the District Court refused to dismiss on double jeopardy grounds, saying:

> I'm still not clear in my mind as to why [the prosecutor] did what he did. But one thing I am satisfied about is he did not do it intentionally attempting to cause a mistrial.
>
> (ROA Vol. V, T 61).

The petitioners argued that the misconduct, which occurred shortly after the warning to avoid mentioning "organized crime", was intentional. They contended that the prosecutor's experience, his awareness of the experience of defense counsel and their careful attempts to preclude the mention of organized crime, the prosecutor's belief that the defense was going "to bury the government's case" (T 106), and the disengenuous after the fact explanations by the prosecutor, established the intentional nature of the prosecutorial misconduct.

On appeal, the petitioners asked that the Court of Appeals independently review the record to determine whether *Oregon v. Kennedy* was violated. However the Court rejected petitioners' argument that intent to cause a mistrial under *Oregon v. Kennedy* was more than a simple finding of fact, and instead applied the "clearly erroneous" test of Rule 52(a), Federal Rules of Civil Procedure.

This Petition for Writ of Certiorari poses the question of what constitutes the proper standard for appellate review of *Oregon v. Kennedy* double jeopardy issues. Petitioners maintain that had the Court of Appeals independently reviewed the record, instead of utilizing the clearly erroneous test, the decision below would have been different. However, for the purpose of certiorari review that is not the critical inquiry. Here the question is solely whether the Court of Appeals deviated from established principles by applying the clearly erroneous test to the case.

REASONS FOR GRANTING CERTIORARI

I

THIS CASE PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION—THE STANDARD OF APPELLATE REVIEW UNDER *OREGON v. KENNEDY*, 456 U.S. 667 (1982)—WHICH THIS COURT SHOULD RESOLVE

In *Oregon v. Kennedy*, 456 U.S. 667 (1982), the Court held that the Double Jeopardy Clause barred reprosecution of a defendant when government conduct was "intended to 'goad' the defendant into [successfully] moving for a mistrial." *Id.* at 676. The Court provided only this discussion of how such conduct could be determined:

> [A] standard that examines the intent of the prosecutor, though certainly not entirely free

> from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.

Id., 456 U.S. at 675.

Justice Powell noted the difficulties attendant to proving subjective intent, and emphasized that a court "should rely primarily upon the objective facts and circumstances of the particular case." *Id.* at 680, (Powell, J., concurring).

Four concurring Justices were severely troubled by the intent standard:

> I would not subscribe to a standard that conditioned such a [double jeopardy] bar on the determination that the prosecutor harbored such intent when he committed prejudicial error. It is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an attempt simply to prejudice the defendant. The defendant must shoulder a strong burden to establish a bar to reprosecution when he has consented to the mistrial, but the Court's subjective intent standard would eviscerate the exception.

Id., 456 U.S. at 688, (Stevens,J., concurring).

None of the *Oregon v. Kennedy* opinions addressed the standard for appellate review of a trial court's conclusion that a prosecutor's misconduct did not intend to provoke a mistrial.

Justice Steven's concerns for the standard's application were well founded. Since announcement of the *Oregon v. Kennedy* intent rule, only two of thirty-nine reported appellate decisions have concluded that a prosecutor "intentionally" meant to goad a mistrial.[1] That grudging application of *Oregon v. Kennedy*, and the appellate adherence to the clearly erroneous test, *Wassall v. Ryan*, 705 F.2d 970, 971 (8th Cir. 1983); *Robinson v. Wade*, 686 F.2d 298, 309 (5th Cir. 1982), are inconsistent with this Court's prior decisions seeking to insure careful appellate protection of fundamental constitutional rights.

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[1]The two cases are *Pool v Superior Court*, 677 P.2d 261 (Ariz. 1984), and *Petrucelli v Smith*, 544 F.Supp. 627 (W.D.N.Y. 1982). The 37 cases finding no double jeopardy violation are *Clauser v Shadid*, 563 F.Supp. 392 (C.D.Ill. 1983), *United States v Kelly*, 543 F.Supp. 1303 (D.Mass. 1982), *United States v Thomas*, 728 F.2d 313 (6th Cir. 1984) *United States v Gonzalez*, 719 F.2d 1516 (11th Cir. 1983), *Wassall v Ryan*, 705 F.2d 970 (8th Cir. 1983), *United States v Cirella*, 688 F.2d 575 (8th Cir. 1982), *United States v Curtis*, 683 F.2d 769 (3rd Cir. 1982), *United States v Head*, 697 F.2d 1200 (4th Cir. 1982), *United States v Singleterry*, 683 F.2d 122 (5th Cir. 1982), *Commonwealth v Lam Hue To*, 461 NE2d 776 (Mass. 1984), *State v Cuthrell*, 311 SE2d 699 (N.C. App. 1984) *Barajas v Superior Court*, 196 Cal. Rptr. 599 (Cal. App. 4 Dist. 1983), *Commonwealth v Beaver*, 436 A.2d 1097 (Pa. Super. 1983), *Commonwealth v Freedman*, 463 A2d 1158 (Pa. Super. 1983), *Commonwealth v Riffert*, 469 A2d 267 (Pa. Super. 1983), *Gant v United States*, 467 A2d 968 (D.C. App. 1983), *Gillett v State*, 663 SW2d 480 (Ct. App. Tex. 1983), *Lozano v State*, 658 SW2d 201(Tex. App. 8 Dist. 1983), *Melchor-Gloria v State*, 660 P.2d 109 (Nev. 1983), *Merriweather v United States*, 466 A.2d 853 (D.C. App. 1983), *Pennington v United States*,

The question of prosecutorial intent is more than a "fact" in the *Oregon v. Kennedy* context. It is an ultimate fact involving legal principles. The finding of intent or no intent is co-extensive with the constitutional conclusion that the Double Jeopardy Clause was, or was not, violated. Thus the dispute in these cases "is not so much over the elemental facts as over the constitutional significance to be attached to them." *Neil v. Biggers*, 409 U.S. 188,193 n.3 (1972). Since under *Oregon v. Kennedy* determining intent also determines the constitutional question, "intent" is more than a fact. It decides whether "a defendant's valued right to complete his trial before the first jury will be a hollow shell. . . . " *Oregon v. Kennedy*, 456 U.S. at 673.

This Court has rejected the clearly erroneous test as a standard for appellate review where the "fact" has a constitutional dimension. In *Bose Corporation v.*

(Footnote 1 Continued)

471 A.2d 250 (D.C. App. 1983), *People v Espinoza*, 666 P.2d 555 (Colo. 1983), *People v. Townsend*, 456 NE2d 938 (Ill. App. 1 Dist. 1983), *People v Turner*, 193 Cal. Rptr. 614 (Cal. App. 4 Dist. 1983), *Stamps v Commonwealth*, 648 SW2d 868 (Ky. 1983), *State v Berry*, 470 A.2d 881 (N.H. 1983), *State v Chase*, 335 NW2d 630 (Iowa 1983), *State v Covington*, 666 P2d 493 (Ariz. App. 1983), *State v Kennedy*, 666 P2d 1316 (Or. 1983), *State v Sharp*, 662 P2d 1135 (Idaho 1983), *Anderson v State*, 635 SW2d 722 (Crim. App. Tex. 1982) *Benford v State*, 298 SE2d 39 (Ga. App. 1982), *Commonwealth v Arelt*, 454 A2d 108 (Pa. Super. 1982), *Hart v State*, 634 SW2d 714 (Crim. App. Tex. 1982), *Mahavier v State*, 664 SW2d 129 (Tex. App. 1982), *Matter of V.G.E.*, 452 A2d 1195 (D.C. App 1982), *State v Wilson*, 658 P2d 204 (Ariz. App. 1982).

Consumers Union of United States, Inc., ____ U.S. ____, 104 S.Ct. 1949 (1984), the Court wrote:

> When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case by case adjudication is of special importance.

Id., 104 S.Ct. at 1961.

Thus in *Bose*, the Court concluded that appellate review of a trial judge's finding of "actual malice" in a libel case is not insulated from independent review by the clearly erroneous test of Rule 52(a) of the Federal Rules of Civil Procedure:

> Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

Id., 104 S.Ct. at 1967.

Absent actual malice, a public official libel plaintiff cannot claim damages. Absent actual intent to goad a mistrial, a private citizen cannot claim double jeopardy protection against a retrial. In *Bose* the Court noted:

> Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future conduct—are too great to entrust them finally to the judgment of the trier of fact.

Id., 104 S.Ct. at 1960 n.17.

This is such a situation. The stakes are the protection of the Double Jeopardy Clause. The future cases and future conduct are those in which prosecutors take advantage of the impossible to prove subjective intent standard, by overreaching with no actual threat of sanction. The dangers of entrusting the standard to a trial judge *sans* independent review are apparent from this case, where the trial judge conceded "there is no doubt that [the prosecutor] did what he did intentionally (ROA Vol.V, T 62); where the trial judge declared a mistrial and was startled by the prosecutor's "unilateral determination" to breach his promise not to mention organized crime (ROA Vol.IV, T 107); where the trial judge said, contradictorily and in the same breath:

> Well, I don't know. As I said before and still today, I still don't understand—I'm still not clear in my mind as to why [the prosecutor] did what he did. But one thing I am satisfied about is he did not do it intentionally attempting to cause a mistrial.
>
> (ROA Vol.V, T 61).

The Double Jeopardy Clause deserves more protection than that provided by the clearly erroneous test. *Bose's* view that "the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied" has equal application to this case. See *Bose*, 104 S.Ct. at 1960.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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OCTOBER 1, 1984

Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Victor DANTE and Edward Levine,
a/k/a "Eddie",
Defendants-Appellants.

No. 84-8031.

United States Court of Appeals,
Eleventh Circuit.

Aug. 20, 1984.

Before KRAVITCH and JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

ALLGOOD, District Judge:

The defendants, Victor Dante and Edward Levine, appeal the order of the district court denying their motion to dismiss their indictment on double jeopardy grounds.

Victor Dante was charged with extortionate credit transactions in violation of 18 U.S.C. §894 and income tax evasion in violation of 26 U.S.C. §7206. Edward Levine was charged as a conspirator in the extortionate credit transactions in violation of 18 U.S.C. §894.

On the day of the trial, but prior to the selection of the jury, Dante's attorney obtained an order from the judge that the prosecutor would not mention the term "organized crime" in the presence of the jury without first bringing it to the court's attention. However, a

short time later, in his opening statement, the prosecutor, on more than one occasion referred to his witnesses' connections to organized crime. He did not connect the defendants to any organized crime families. The defense made no objections to those references, even though other objections were made during the opening statement. At the close of all the opening statements the defendants moved for a mistrial. Over the strenuous objections of the prosecutor, the judge granted a mistrial and rescheduled the case for one month later.

Prior to the date set for the second trial the defendants moved to dismiss the indictment, claiming that a second trial would violate the Double Jeopardy Clause of the Fifth Amendment. The defendants argued that the prosecutor had intentionally provoked them into making the mistrial motion, thus denying them their right to a trial before the jury of their choosing. After a hearing on the issue, the court denied the motion saying, "the defendants have failed to establish that the government intended or wanted a mistrial." It is from this order that the defendants appeal.

The defendants urge this court to make an independent review of the facts and circumstances rather than applying a clearly erroneous standard, arguing that the issue of the prosecutor's intent is a mixed question of law and fact, citing *Douglas v. Wainwright*, 714 F.2d 1532, 1554 (11th Cir. 1983), to support this contention. *Douglas v. Wainwright* provides little if any support for such an argument since the issue held to be a mixed question of law and fact in that case was the ineffective assistance of counsel. The Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72

L.Ed.2d 416 (1982), said that the determination of the prosecutor's intent is a finding of fact for the court. *Id.* at 675, 102 S.Ct. at 2089. Thus this court must only determine whether the findings of the trial court were clearly erroneous.

The Supreme Court has recently said in *Oregon v. Kennedy* that a defendant is entitled to a dismissal on double jeopardy grounds if the court finds the prosecutor intentionally provoked the defendants into moving for a mistrial so the government would have the opportunity to try the case before another jury. Conduct that would be sufficient to justify a mistrial would not bar retrial unless the court does find such intent on the part of the prosecutor. *Id.* at 675, 676, 102 S.Ct. at 2089-2090.

The trial judge observed the prosecutor during his opening remarks. The judge also heard and observed the prosecutor as he explained his unilateral decision to violate the court order to refrain from using the term "organized crime." After these observations, reviewing the statements made and applying the standard of *Oregon v. Kennedy*, the judge concluded that the requisite intent to provoke a mistrial was absent. The court pointed to the fact that the references to organized crime referred to the government's witnesses only and there was no direct reference to either of the defendants in that regard. The court further noted that the delay will work to the defendants' advantage rather than disadvantage and the failure of the defendants to object to the violations of the court's order at the time they were made when the infraction could have been cured with proper instructions to the jury, "mitigate to a certain extent the Government's violation."

The findings of the trial court are amply supported by the record, thus the denial of the defendant's motion is AFFIRMED and the case is REMANDED to the district court for retrial.